No. 80-1325

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE LEIGHTON DAHL,
Petitioner,

versus

TED M. AKIN and GLORIA DAHL AKIN,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

This case presents the question of whether the Akins, merely private persons, acted "under color of law" for the purposes of 42 U.S.C. §1983 by simply invoking state judicial processes and thereby obtaining orders affecting the liberty and property of the Petitioner, Dahl.

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GEORGE LEIGHTON DAHL,
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BRIEF OF RESPONDENTS IN OPPOSITION

To the Honorable Chief Justice of the
United States and the Associate Justices
of the Supreme Court of the United States:

Respondents Ted M. Akin and Gloria Dahl Akin (the "Akins") respectfully pray that Writ of Certiorari be

denied herein. The decision of the Fifth Circuit is correct and is not in conflict with decisions of this Court or other Courts of Appeals.

STATEMENT OF THE CASE

The Akins generally agree with Petitioner's Statement of the Case, but object to his characterizations included therein, particularly his statement of the purpose of the state court actions initiated by the Akins (Petitioner's Brief at p. 2). To the extent Dahl's Statement of the Case purports to be a summary of his Amended Complaint, the Akins understand that in this proceeding, which is an appeal from a dismissal for failure to state a claim, they and this Court must accept the factual allegations of the Amended Complaint as true. *Conley v. Gibson*, 355 U.S. 41 (1957). Of course, it is only in this strict legal sense that the Akins can be said not to dispute Dahl's allegations. Also, the merits *vel non* of Dahl's claims of constitutional deprivation are not involved herein, and no response thereto, legal or factual, will be made by the Akins. It should be noted that contrary to Dahl's assertion in his Brief, the Fifth Circuit did not hold that Dahl was deprived of liberty and property without due process of law or that the Texas Probate Court and the Texas Mental Health Code are unconstitutional (Petitioner's Brief at p. 4). The Fifth Circuit merely held that Dahl's Amended Complaint *stated a claim* for deprivation of rights secured by the Constitution. *See Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980).

Reduced to its essentials, Dahl's Amended Complaint claims that the Akins conspired with each other to deprive him of liberty and property through the use or abuse of the Texas probate or guardianship machinery. In the course of this alleged conspiracy, the Akins are said to have taken advantage of such machinery, including the Texas procedure permitting the ex parte appointment of a temporary guardian without notice. (R. 84, ¶ 15). This procedure and the statute authorizing it are alleged to be unconstitutional as failing to afford minimum procedural due process under *Fuentes v. Shevin*, 407 U.S. 99 (1972). The Akins were not alleged to be anything other than private persons, although their resort to the state courts does appear on the face of the Amended Complaint. Only conspiracy between the Akins themselves was asserted; there were no allegations of conspiracy between the Akins and state officials (Transcript of Proceedings at p. 21, lines 16-19; R. 76, ¶ 3).

ARGUMENT

A. "State Action" and "Action Under Color of Law" Are Separate and Distinct Issues Under Section 1983

This Court in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970), held that there are two separate elements necessary to recovery under Section 1983:

> First, the Plaintiff must prove that the Defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of his constitutional right 'under color of any statute, ordinance, regulation, custom or usage of any state or territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'

Some earlier opinions of this Court and some post-*Adickes* lower federal court opinions state that the "state action" and "under color of law" requirements are synonomous. *See, e.g.: United States v. Price*, 383 U.S. 787, 794 n.7 (1966); *Shirley v. State Nat'l Bank*, 493 F.2d 741 (2d Cir. 1974). However, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978), this Court explained the distinction between the two elements[1] of a Section 1983 claim:

> Some rights established either by the Constitution or by federal law are protected from both governmental and private deprivation. See *e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-24, 88 S.Ct. 2186, 2194-95, 20 L.Ed.2d 1189 (1968) (discussing 42 U.S.C. §1982). Although a private person may cause

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1 This Court noted that when the defendant is a public official (and presumably acting in such capacity), "the two elements of a §1983 action merge." 436 U.S. at 157 n.5. The Akins were not alleged to have acted in any official capacity.

> a deprivation of such a right, he may be subjected to liability under Section 1983 only when he does so under color of law. Cf. 392 U.S., at 424-25 and n.33, 88 S.Ct. at 2195. However, most rights secured by the Constitution are protected only against infringement by governments. See *e.g., Jackson* [*v. Metropolitan Edison Co.*], 419 U.S., at 349, 95 S.Ct. at 452; *Civil Rights Cases*, 109 U.S. 3, 17-18, 3 S.Ct. 18, 25-26, 27 L.Ed. 835 (1883). Here, respondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law.

In the opinion below, the Fifth Circuit correctly distinguished between these two elements of a Section 1983 claim and held with respect to the first element, that Dahl's Amended Complaint properly alleged a state deprivation of liberty and property without due process of law, freedom from which constitute a right secured by the Constitution. *Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980). Despite this partial victory, much of Dahl's Petition for Writ of Certiorari is directed to a showing that *state action* is present when a state court's orders reach out and seize a person or a person's property. At this stage of the proceeding, which is an appeal from a dismissal on the basis of a failure to state a claim upon which relief can be granted, the Akins do not dispute that Dahl has properly alleged the existence of

state action. However, further discussion of this issue in this Court in light of the Fifth Circuit's agreement with Dahl can only serve to further confuse the very distinct concepts of state action and action under color of law. Indeed the cases most heavily relied upon by Dahl are "state action cases, not cases involving the issue of whether the private defendants acted under color of law. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); and *Fuentes v. Shevin*, 407 U.S. 67 (1972). Neither *North Georgia* nor *Sniadach* involved Section 1983. Both cases originated in state courts and reached this Court via 28 U.S.C. §1257. Thus, although in considering the due process claims in each of these cases, this Court implicitly found state action (which is a requisite to a due process violation), nevertheless, the requirement of action under color of law under Section 1983 could not possibly have been considered by this Court. Although *Fuentes* was pled as a Section 1983 claim, upon review by this Court the only issue was whether the lower court's dismissal was proper. The lower court had found that the Plaintiff's complaint failed to allege the deprivation of a Fourteenth Amendment right and accordingly held that the complaint should be dismissed for the failure to satisfy the first element required for a Section 1983 claim. This Court disagreed, and found a due process violation was alleged. Thus, the case was remanded for further consideration, and this Court did *not* hold that the one private creditor-defendant who set the wheels of the state judiciary in motion had taken action under color of law.

Further *Fuentes* only involved a request for declaratory and injunctive relief, and the primary defendant therein was the Attorney General of the State of Florida.

Therefore, when Dahl says in his Petition that the "facts of this case are indistinguishable from those of the creditor cases" (Petitioner's Brief at p. 8), he fails to understand that those cases only involved a determination of the existence of state action and wholly failed to speak to the issue of whether action under color of law was present.

B. What Constitutes Action Under Color of Law by a Private State Court Litigant

In *Adickes v. S. H. Kress & Co.*, 398 U.S. at 161 n.23, this Court set forth the *minimum* requirements in order to show action under color of law by a private person: *"Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of Section 1983, . . .* we think it is essential that he act with the knowledge of and pursuant to that statute [emphasis added]." Contrary to Dahl's statement in his Brief at page 12, this Court has never held that a plaintiff's allegation of this bare minimum will in fact satisfy the action under color of law element. Indeed, the quoted statement from *Adickes* indicates that the Court itself contemplated some additional requirements.

This reservation of what additional facts would be necessary to allege action under color of law under Sec-

tion 1983 continued in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156: "Certainly, the complaints can be fairly read to allege such knowledge on the part of Flagg Brothers, however, we need not determine whether any further showing is necessary, ..."

Earlier, in *United States v. Price*, 383 U.S. 787, 794 (1966), the Court stated:

> Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a *willful participant* in *joint activity* with the State or its agents [emphasis added].

Accordingly, in *Adickes*, this Court held that the plaintiff would be entitled to relief under Section 1983 "if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow *reached an understanding* to deny Miss Adickes service in the Kress store . . . ." 398 U.S. at 152 [Emphasis added]. Lower courts have consistently interpreted these opinions to require an actual conspiracy or knowing in concert action between the private defendant and the state officials in order to constitute action under color of law. *See Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977) ("customary plan"); *McNally v. Pulitzer Publishing Co.*, 532

F.2d 68, 75 (8th Cir. 1976); *Slavin v. Curry*, 574 F.2d 1256, 1265 (5th Cir. 1978); *Smith v. Brookshire Bros., Inc.*, 519 F.2d 94 (5th Cir. 1975) ("preconceived plan"); *Antelman v. Lewis*, 480 F.Supp. 180, 185-86 (D. Mass. 1979); *Coggins v. Carpenter*, 468 F.Supp. 270, 282-83 (E.D. Pa. 1979); *Green v. Truman*, 459 F.Supp. 342, 344 (D. Mass. 1978); *Baer v. Baer*, 450 F.Supp. 481, 486-88 (N.D. Cal. 1978).

Recently, in *Dennis v. Sparks*, 101 S.Ct. 183 (1980), this Court once again addressed the question of what degree and type of participation by a private person in state action is necessary to give rise to action under color of law within the meaning of the phrase as used in Section 1983. *Dennis* was decided one week after the Fifth Circuit rendered the opinion below, and, therefore, the Fifth Circuit did not have the benefit of this Court's reasoning therein. However, *Dennis* is consistent with and supportive of the opinion below.

In *Dennis* the Court overturned the so-called "derivative immunity" doctrine which had held that a Section 1983 action against private persons accused of conspiring with a judge or other wholly immune state official cannot be maintained on the basis that as a matter of law the Plaintiff could not allege that the private defendants were acting under color of state law. In this context, one in which private persons were alleged to have been jointly engaged with state judicial officials in a deprivation of the Plaintiff's Fourteenth Amendment rights, the Court once again noted that it was

enough that the private person be a *willful participant* in *joint action* with the state or its agents. In *Dennis* it was alleged that the private person actually bribed the state judge and entered into a conspiracy to injure the plaintiff. In holding that such allegations properly alleged action under color of state law by the private defendants, the court stated significantly: *"Of course, merely resorting to the courts and being on the winning side of the lawsuit does not make a party a co-conspirator or a joint actor with the judge."* 101 S.Ct. at 186 [emphasis added]. Therefore, this Court in *Dennis* has clearly indicated that the "willful participation" in "joint activity" with state officials requires some meeting of the minds and common understanding of a prohibited purpose. Suing another in a state court is not the kind of activity by a private person intended to be within the ambit of Section 1983. Indeed, the Court would likely not have abolished the doctrine of "derivative immunity" had less eggregious "joint activity" between the private defendants and the state judge been alleged.

Accordingly, when a private litigant merely invokes the processes of the state courts, and the state action involves the application of neutral state statutes, the private litigant cannot be said to have acted under color of law even if the constitutional rights of the federal court plaintiff be thereby abridged in some manner. This holding is consistent with numerous prior decisions of circuit and district courts. *See Torres v. First State Bank*, 588 F.2d 1322, 1325-27 (10th Cir. 1978); *Taylor v. Nichols*, 558 F.2d 561, 564 (10th Cir. 1977); *Harley v. Oli-*

ver, 539 F.2d 1143 (8th Cir. 1976); *Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975); *Wartman v. County Court*, 510 F.2d 130, 134 (7th Cir. 1975); *Sykes v. California*, 497 F.2d 197, 202 n.13 (9th Cir. 1974); *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam), *overruled on other grounds, Sparks v. Duval County Land Co.*, 604 F.2d 976 (5th Cir. 1979); *Barnes v. Dorsey*, 480 F.2d 1057, 1061 (8th Cir. 1973); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Stevens v. Frick*, 372 F.2d 378 (2d Cir. 1967); *Byrne v. Kysar*, 347 F.Supp. 734, 736 (7th Cir. 1965); *Skolnick v. Martin*, 317 F.2d 855, 857 (7th Cir. 1963); *Antelman v. Lewis*, 480 F.Supp. 180, 185 (D. Mass. 1979); *Orlando v. Weizel*, 443 F.Supp. 744 (W.D. Ark. 1978); *Baer v. Baer*, 450 F.Supp. 481 (N.D. Cal. 1978); *Lefkowitz v. Lider*, 443 F.Supp. 359 (D. Mass. 1978); *Phillips v. Fisher*, 445 F.Supp. 552 (D. Kan. 1977); *Girard v. Ninth Street and Fifth Avenue Corp.*, 369 F.Supp. 450, 455 (S.D.N.Y. 1975); *Hohensee v. Daily*, 383 F.Supp. 6 (M.D. Pa. 1974); *Weise v. Reisner*, 318 F.Supp. 580 (E.D. Wis. 1970); *Schetter v. Heim*, 300 F.Supp. 1070 (E.D. Wis. 1969); *Weiser v. Medical Care System, Inc.*, 432 F.Supp. 1148, 1152 (S.D.N.Y. 1956).

C. Sound Public Policy Supports the Opinion Below

Sound public policy supports the Fifth Circuit's refusal to hold that a private state litigant acts under color of law for the purposes of Section 1983 by merely availing himself of a state's judicial processes. A state court is presumed to be impartial and neutral in the conduct of civil litigation. Persons should be encour-

aged to seek resolution of disputes in such forums. Indeed, the right to do so is protected by the First Amendment. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Indeed, a construction of Section 1983 that would subject a private state litigant to liability for damages anytime an unconstitutional statute is relied upon or an unconstitutional procedure is employed by state courts would raise a serious question concerning the constitutionality of Section 1983 and should, therefore, be avoided.

It is true that when a private litigant obtains relief in the state courts, the state's coercive power is thereby placed behind litigant. However, if the state court defendant is being deprived of his constitutional rights in some manner by virtue of the exercise of the state court's coercive power, it is the state, not the private litigant, that is causing such deprivation. This is so unless there is a conspiracy between the private litigant and state judicial officials. Perhaps an example using the executive branch of government will make this point more clearly. It has been generally held, as noted above, that a private person does not act under color of state law (absent discriminatory "in concert" action with state officials) when he causes the arrest or detention by state officials of another person. In such an episode, there may clearly be state action because of the intervention of state officials to actually effect the arrest or detention of the potential civil rights plaintiff, but the courts hold that the private complainant does not act under color of law. So, if the citizen causes

the arrest of another by a state action (whether under an unconstitutional or a constitutional statute), he is not acting under color of law, then *a fortiori* a state court plaintiff who obtains a dispositive order should not be held to have acted under color of state law. In other words, there are many instances in which a private person may start the wheels of state government to move against another person, resulting in the deprivation of such person's constitutional rights. However, if the complainant is indeed a private person (and not a state functionary), there is only one method by which such person may be held liable under Section 1983 — *i.e.*, when the private individual "jointly engages or conspires with a state official to deprive a plaintiff of his constitutionally protected rights. Such conspiracy or joint activity causes the private individuals' acts to be considered as having been taken under color of state law." *Dennis v. Hein*, 413 F.Supp. 1137, 1140 (D.S.C. 1976), citing *Adickes*. As Judge Gee stated in his dissent in *Smith v. Brookshire Bros., Inc.*, 519 F.2d 94, 97 (5th Cir. 1975): "The vision of a citizen's hesitating to call for police assistance in fear they may, when they arrive, employ some unconstitutional procedure over which he has no control and thus render him liable in a Section 1983 action is not an attractive one." Similarly, the vision of a citizen's resort to self-help (potentially violent), rather than resort to his state's judicial process to resolve the controversies in fear of liability under Section 1983 in the event the state courts employ an unconstitutional procedure or render unconstitutional

judgments, is not an attractive one. In the absence of conspiracy between private litigants and state executive or judicial officers, such private litigants should not be deemed to be acting "jointly" or "in concert" with state officials or otherwise acting under color of state law for Section 1983 purposes by merely attempting to peacefully work out their controversies in a judicial form. In no sense can a private litigant who happens to obtain a state court judgment be deemed to carry the state's "badge of authority" for the purposes of Section 1983. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

Dahl's complaint with regard to the Texas statutes is that they fail to provide adequate notice and hearing prior to confinement and other deprivation of rights. In light of the foregoing authorities, it would be absurd to hold the Akins, purely private individuals, responsible for the failure of the Texas Legislature or the Texas courts to provide any constitutionally required notice to Dahl. *See Martin v. Aubuchon*, 623 F.2d 1282, 1285 (8th Cir. 1980) (per curiam) ("there is no showing these nonjudicial persons were under any duty to provide notice or advise [the plaintiff] of his legal rights").

In summary, it is submitted that the dismissal of Dahl's amended complaint was justified, because it appears beyond a doubt that Dahl could prove no set of facts in support of his claims which would entitle him to relief. This, of course, does not mean that Dahl is with-

out a remedy. He may urge his constitutional defenses in the state courts, and in the event the state courts do not sufficiently protect his federal constitutional rights, he may seek review by this Court via certiorari. Or, given the overt governmental action, he may seek injunctive relief against the appropriate state officials, subject to equitable principles and principles of federalism. *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (Section 1983 was passed to enforce the provisions of the Fourteenth Amendment against all state action, including *judicial* action); *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea v. Littleton*, 414 U.S. 488 (1974) (state executive and judicial officials, though qualifiedly and wholly immune to Section 1983 damage claims, respectively, are not immune to suits for injunctions). These are the routes mandated by the Constitution and our system of federalism, recognizing that state courts are as capable of adjudicating federal constitutional defenses as federal district courts. This is the path which the body of law under the concept of action under color of law requires Dahl to take. A decision that the Akins acted under color of law in availing themselves of the neutral state forums would substantially and unwisely widen the pathway to federal court and encourage unwarranted intrusion into the state judicial process inconsistent with the principles of federalism enunciated by this Court.

CONCLUSION

For the foregoing reasons, the Akins respectfully request that the Petition for Writ of Certiorari be denied. In the alternative, the Akins respectfully pray that the Writ of Certiorari be granted and that the opinion below be summarily affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, PAUL D. SCHOONOVER, attorney for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing Brief of Respondents in Opposition have been mailed on the ____day of March, 1981, to Thomas L. Case of Bickel and Case, 5441 First International Building, Dallas, Texas 75270, attorney for Petitioner.

PAUL D. SCHOONOVER